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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

*Appellants,*

*against*

SUSAN M. W. NORWICK,

*Appellee,*

TARJA U. K. DACHINGER,

*Intervenor-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLANTS

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*Appellants,*

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TARJA U. K. DACHINGER,

*Intervenor Appellee.*

## APPELLANTS' BRIEF—ERRATA

Page i, line 3—
delete "Staute" and insert "Statute" in place thereof.

Page 5, second paragraph, line 20—
delete "Appellees'" and insert "Appellants'" in place thereof.

Page 10, line 18—
insert quotation marks after "taught."

Page 18, first paragraph, line 14—
delete "of" and insert "or" in place thereof.

Page 26, second paragraph, line 16—
insert "hyphen" between "N" and "9."

Page 27, first footnote, line 2—
insert "8" after "E.g."

Page 33, closing—
delete "State of New York Attorney General of the" and insert "Attorney General of the State of New York" in place thereof.

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| POINT I—Education Law § 3001(3) does not violate the equal protection clause because it limits permanent certification of public school teachers to citizens and aliens who apply for citizenship. Public education trains children to participate in American democratic society. Section 3001(3) qualifies the individuals who undertake this responsibility in terms of their ability and willingness to identify with this society. Although properly reviewed under the traditional equal protection test, Section 3001(3) survives strict scrutiny because the state interests involved are substantial and the classification is precise | 15 |
| A. The traditional equal protection test requiring a showing of only a reasonable relationship to a legitimate state interest is applicable to Education Law § 3001(3) | 15 |

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B. New York's interest in educating public school children for participation in American democratic society is legitimate and substantial. In denying permanent teaching certificates to aliens who are eligible for American citizenship but prefer foreign citizenship, Education Law § 3001(3) establishes a narrow limitation consistent with the achievement of this interest. There is no appropriate classification which is more precise and less restrictive ... 20

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TARJA U. K. DACHINGER,

*Intervenor-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLANTS

The Commissioner of Education of the State of New York and the Directors of the Division of Teacher Education and Certification and of the Division of Professional Conduct of the Education Department appeal from an Order and Judgment of a three-judge district court entered in the Southern District of New York on August 25, 1976

(A. 54†). The Order and Judgment declared New York Education Law § 3001(3) unconstitutional and permanently enjoined its enforcement on the ground that the statute's exclusion of aliens who had not applied for citizenship from the class of individuals eligible for permanent teaching certificates denied the excluded aliens equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

## Opinions Below

The opinion of the three-judge district court (A. 35-A. 53) is reported at 417 F. Supp. 913.

The memorandum and order of the single district judge convening the three-judge court (A. 22-A. 23) is not reported.

## Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

The Order and Judgment of the three-judge district court (A. 54) was entered on August 25, 1976. The Notice of Appeal (A. 55) was filed on October 13, 1976. The Jurisdictional Statement was filed on December 11, 1976, and probable jurisdiction was noted on May 15, 1978.

## State Statute Involved

New York Education Law § 3001 states in part:

"QUALIFICATIONS OF TEACHERS

"No person shall be employed or authorized to teach in the public schools of this state who is:

* * *

† References preceded by the letter "A" refer to the Appendix filed on this appeal.



"3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply, after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment."

New York Education Law ("Education Law") § 3001-a, portions of Education Law § 3005, and 8 New York Codes, Rules and Regulations ("NYCRR") § 80.2(i) are set forth in the Appendix to this brief, pp. 1a-2a.

## Questions Presented

1. Should Education Law § 3001(3) be closely scrutinized because it limits permanent certification of public school teachers to citizens and aliens who have applied for citizenship?

2. Does the classification established by § 3001(3) reasonably or necessarily safeguard New York's interest in educating public school children to participate in this democratic society?

## Statement of the Case

Appellee Norwick and intervenor-appellee Dachinger are permanent resident aliens (A. 5, A. 17, A. 25, A. 49, n. 2).* Ms. Norwick is a citizen of Great Britain. She has resided in the United States since 1965 and is married to an American citizen (A. 5, A. 6, A. 25, A. 49, n. 2). She has

* The record does not indicate when either appellee became a permanent resident.

decided to retain her British citizenship indefinitely (A. 35). Ms. Dachinger is a citizen of Finland. She has resided in the United States since 1966 and is also married to an American citizen (A. 17, A. 18, A. 25, A. 49, n. 2). She has decided to retain her Finnish citizenship indefinitely (A. 35).

Both appellees applied to the Education Department for certification as early childhood and upper elementary public school teachers, Nursery ("N") through sixth grade. Education Law § 3006; 8 NYCRR §§ 80.1(a)(10), (36), 80.15(a)(i), (b). Their applications were denied because they were not American citizens or applicants for citizenship as required by Education Law § 3001(3) and because they were not within the excepted categories providing temporary certificates for aliens, i.e. Education Law § 3001-a, authorizing temporary certificates for first preference aliens unable to become permanent residents because of over-subscribed quotas, and 8 NYCRR § 80.2(i), authorizing temporary certificates for aliens under statutory disabilities and those with skills not available from permanently certified teachers. Ms. Norwick applied for temporary certification only (A. 6), apparently aware that in addition to her non-applicant status, she did not meet the post-graduate education requirements for a permanent certificate. 8 NYCRR § 80.15(b). Her application was denied on March 19, 1974 (A. 7). Ms. Dachinger possesses an appropriate graduate degree (A. 17) and requested permanent certification (A. 18). Her application was denied on April 23, 1975 (A. 19). Ms. Dachinger had obtained a temporary elementary school certificate from the Education Department in 1970 (A. 18). The application for that certificate required her to file a declaration of intention to become a United States citizen.

Appellee Norwick commenced this action for declaratory and injunctive relief on June 27, 1974 (A. 35).* The

* Appellee Dachinger intervened on September 3, 1975 with the consent of the appellants (A. 2, 9/5/75 entry, A. 36).



complaints allege that Education Law §§ 3001, 3001-a and 8 NYCRR § 80.2(i) deny aliens equal protection and due process of law (A. 8, 19-20) and violate the Supremacy Clause because they conflict with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* A. 8, A. 20.

Jurisdiction was alleged under 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. § 1343(3) and (4). A. 4, A. 16, A. 35. Appellants' answer was read in opposition to both complaints. It traversed the material allegations and supported the constitutionality of the challenged provisions and their consistency with the Immigration and Nationality Act (A. 12-A. 13, A. 14). A three-judge court was convened with the consent of the appellants (A. 22), and the action was determined on appellees' motion for summary judgment (A. 24-A. 34, A. 36).

The three-judge court limited its holding to appellees' equal protection claim against Education Law § 3001(3). A. 36, A. 50, n.6, A. 39-A. 48. In the lower court's view, *Graham* v. *Richardson,* 403 U.S. 365 (1971), *Sugarman* v. *Dougall,* 413 U.S. 634 (1973) and *In re Griffiths,* 413 U.S. 717 (1973), required the application of a heightened equal protection test to "any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-a-vis citizens." A. 42. The court then acknowledged the "strong nexus between the classroom and the political community" (A. 44) and the teacher's role in shaping the " 'attitude of young minds toward the society in which they live,' " [A. 44-45, quoting *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952)] but found nonetheless that § 3001(3) could not survive strict scrutiny. The statute was considered imprecise because it applied to all aliens in all teaching positions in the public school system (A. 44-A. 45), because it did not apply to private school teachers (A. 45) and because it authorized temporary certificates for aliens with skills not otherwise available (A. 45-A. 46). Appellees' offer of the testimony of Dr. Anthony E. Terino, then

Director of the Division of School Supervision of the Education Department, was rejected (A. 47-A. 48). Dr. Terino would have testified that teachers in elementary and secondary public schools are required to impart principles of American citizenship to their students, that teachers do not simply instruct in particular subject matter but are examples who influence student attitudes and behavior, and that aliens who prefer to continue their allegiance to another nation and their identification with that nation's political traditions, culture and mores are inappropriate candidates for teaching positions (A. 33-34, A. 47). The court stated that the proposed testimony would not support the conclusion that a permanent resident alien's voluntary decision to retain native citizenship rendered him unqualified to teach (A. 48) and that the testimony would not establish that the exclusion of all non-applicant aliens from all teaching positions was necessary to advance New York's interests Education Law § 3001(3). A. 47.

Since the entry of the Order and Judgment below on August 25, 1976 (A. 54), 240 aliens have obtained permanent teaching certificates from the Education Department. Each applicant was advised that the continuing validity of his certificate was contingent upon the outcome of this appeal.

## Qualifying Teachers for New York Public Schools: "Citizenship" Requirements

New York qualifies teachers for elementary and secondary public schools on the basis of education, experience, character and citizenship. Education Law §§ 3001(3), 3001-a; 8 NYCRR Parts 7, 80, 83. Citizens and aliens who apply for citizenship are eligible for permanent certificates. Education Law § 3001(3). Aliens under statutory disabilities, exchange teachers and those with skills not available from permanently qualified teachers are eligible for temporary certificates. Education Law §§ 3001(3),



3001-a, 3005; 8 NYCRR § 80.2(i).* Public funds cannot be used to compensate teachers who do not meet all applicable requirements, Education Law §§ 3309, 3604(7); 8 NYCRR § 7.3, and payments to "unqualified teachers" are misdemeanors. Education Law § 3010.**

Citizenship or application for citizenship became a statewide qualifying requirement in 1918. L. 1918, c. 158, § 1, eff. Apr. 4, 1918.*** In 1965, first preference aliens unable to adjust their status to permanent residents because of over-subscribed quotas became eligible for temporary certificates. L. 1965, c. 595, § 1, eff. June 28, 1965, adding Education Law § 3001-a. In 1967, the Commissioner of Education was empowered to make regulations concerning the employment of alien public school teachers. L. 1967, c. 282, § 1, eff. July 1, 1967, adding concluding sentence to Education Law § 3001(3) as it is currently in force.**** Section 80.2(i) of 8 NYCRR, authorizing temporary certificates for aliens unable to apply for citizenship because of statutory disabilities and for aliens with skills not

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* The Education Department has advised that no temporary certificates have been issued under Education Law § 3001-a, quota disabilities, or 8 NYCRR § 80.2(i)(1), skills not available from permanently certified teachers. Certificates have not been issued under § 3001-a because of the broader disabilities provision in 8 NYCRR § 80.2(i)(2). Certificates have not been issued under § 80.2(i)(1) because no emergent instructional need has been presented. Approximately 200 temporary certificates are issued annually under the § 80.2(i)(2) disabilities provision.

** Section 80.32 of 8 NYCRR authorizes temporary and conditional employment of public school teachers who do not meet all the educational requirements for certification if no "certified and qualified teacher is available after extensive recruitment."

*** Only incumbents could qualify as applicants under early legislation. L. 1918, c. 158; L. 1919, c. 120. Any applicant for citizenship became eligible for permanent certification in 1922. L. 1922, c. 315, eff. Mar. 28, 1922.

**** Education Law § 3005, providing, *inter alia*, for temporary certificates for foreign exchange teachers was also amended in 1967, L. 1967, c. 282, § 2, to extend the period of certification from one to two years.

available from permanently qualified teachers, was promulgated by the Commissioner on November 28, 1967 under L. 1967, c. 282.

The Commissioner's power under the 1967 legislation (L. 1967, c. 282, § 1) is limited to the issuance of temporary certificates. The bill was prepared by the Education Department and introduced at its request. McKinney's 1967 Session Laws of New York ("Session Laws") 280, Note. It was intended to enable the employment of a non-applicant alien for "a limited period" (Memorandum of the Education Department in Support of L. 1967, c. 282, 1967 Session Laws, p. 1461), and has been implemented consistently with this purpose and with Education Law § 3001-a, authorizing only temporary certificates for first preference aliens under quota disabilities.

New York's "system of free common schools, wherein all the children of [the] state may be educated" was constitutionally mandated in 1894. N.Y. Const. 1894, incorporating new Art. 9, § 1, renumbered Art. 11, § 1, eff. Jan. 1, 1939.* The schools were to be publicly funded, and numerous enough to accommodate all children whose parents or guardians chose to use them. 3 LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 1894-1905 ("Lincoln") 555-56 (1906).

Public education had existed for one hundred years in New York prior to attaining constitutional status in 1894. From the first legislation, L. 1795, c. 75, eff. Apr. 1795, to the present, cost has been shared by state and local school districts.** The districts have been, and continue to be,

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* "Common schools" are elementary and secondary schools. 10 N.Y. State Rep. 449 (1916).

** L. 1795, c. 75, provided 20,000 pounds to be apportioned among localities on condition that the apportioned amounts be matched or exceeded. Current provisions, Education Law Arts. 73, 74, continue to require state and local contributions.



responsible for administration (Education Law, Arts. 31-51), curriculum development (Education Law §§ 801-811, 3204) and teacher selection (Education Law Arts. 61, 63) under limited statewide standards. *See Kramer* v. *Union School District,* 395 U.S. 621, 623-24 (1969).*

Curriculum has been subject to generalized state standards from the outset.** Current provisions for the first eight years of instruction require courses in "at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science." Education Law § 3204(3)(a)(1); 8 NYCRR § 100.1(e). Children over eight years of age are required to participate in courses in patriotism and citizenship, including study of the federal and state constitutions and Declaration of Independence in order to promote "patriotic and civic service and . . . foster . . . qualities . . . essential . . . to meet the objectives of citizenship in peace or in war." Education Law § 801(1),(2),(3). Current provisions for

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* The current plan for school district organization derives from L. 1812, c. 242, eff. June 19, 1812. *See* Committee Report, JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK, 35th Session, 1812 ("1812 Committee Report"), pp. 102, 104. This legislation is generally regarded as establishing the modern, common school system. *Judd* v. *Board of Education,* 278 N.Y. 200, 15 N.E. 2d 576, 579-80 (1938). It introduced state supervision under a Superintendent and continued the localities' role in funding and in the selection of courses and methods of instruction. 1812 Committee Report, pp. 103, 104-105; 3 Lincoln, pp. 539-40.

** L. 1795, c. 75 required that the children be instructed in the English language, grammar, arithmetic, mathematics and "such other branches of knowledge as are most useful and necessary to complete a good English education." 3 Lincoln, p. 526. Under L. 1812, c. 242, children were to be instructed in "at least those branches of education which are indispensably necessary to every person in his intercourse with the world, and to the performance of his duty as a useful citizen," including "[r]eading, writing, arithmetic and the principles of morality."

secondary education require instruction in "at least the English language and its use, civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States" [Education Law § 3204(3)(a)(2); 8 NYCRR § 100.1 (a)-(d)] and authorize courses in communism. Education Law § 3204(2)(3).* Instructional exercises on the federal and state bills of rights [Education Law § 801(4)], the flag [Education Law § 802(1); 8 NYCRR Part 108], and patriotic holidays [Education Law §§ 802(2); 8 NYCRR § 109.1] are also required in all public schools.** Article 11, § 3 of the state constitution, adopted (as Art. 9, § 4) in 1894 with § 1 mandating free, common schools, prohibits direct or indirect public aid to any school "wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. *See McCollum* v. *Board of Education,* 333 U.S. 203, 214-15 (1948) and 3 Lincoln, pp. 561-73.***

Certification of public school teachers became a statewide requirement in 1843 (L. 1843, c. 133, § 10, eff. June 1, 1843) and citizenship, a statewide requirement in 1918, as

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* The issuance of a state diploma signifies the satisfactory completion of the prescribed courses and at least eighteen additional units. 8 NYCRR § 103.2.

** Instruction in physical education [Education Law § 803(1); 8 NYCRR §§ 135.1-135.4], highway and traffic safety [Education Law § 806(1); 8 NYCRR § 107.1], conservation [Education Law § 810(2)], humane treatment of animals [Education Law § 809] and the effects of alcohol [Education Law § 804(1)] and narcotics [Education Law § 804-a(1)] are also required under statewide curriculum standards.

*** Public expenditures for examination and inspection of sectarian schools were excepted initially. N.Y. Const. 1894, Art. 9, § 4. Expenditures for the transportation of pupils were excepted in 1938. N.Y. Const. Art. 11, § 3, as amended.



noted.* Certificates are currently available for early childhood and upper elementary education, N through sixth grade [8 NYCRR §§ 80.1(a)(10),(36), 80.15(a)(1)(i),(b)], for these grades plus early secondary grades, including an academic subject, i.e. N through nine [8 NYCRR §§ 80.1 (a)(11), 80.15(a)(1)(ii), (b)], and for academic subjects taught in secondary schools, i.e. English, foreign languages, mathematics, social studies and science [8 NYCRR §§ 80.1 (a)(1), 80.16(a)(1)(ii), (b)].** Any certified teacher may be required to spend up to five classroom hours per week teaching subject matter outside his certification. 8 NYCRR § 80.2(c).*** All public school teachers, including temporarily certified aliens, are required to take an oath to support the federal and state constitutions and to faith-

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* New York City and Buffalo issue their own licenses [Education Law §§ 2596, 3008; 8 NYCRR § 80.2(j)], but must comply with the citizenship requirements in Education Law §§ 3001(3), 3001-a and 8 NYCRR § 80.2(i). These city certification requiremens generally parallel the state requirements discussed. See e.g., BYLAWS OF THE BOARD OF EDUCATION, CITY SCHOOL DISTRICT OF NEW YORK, §§ 5.1.1, 5.1.2, App. B-2-B-3 (2/77 rev. ed.).

** Teaching certificates are also available in occupational subjects (8 NYCRR § 80.5), special education for the hearing and visually impaired (8 NYCRR § 80.6), reading (8 NYCRR § 80.7), in special subjects including physical education (8 NYCRR § 80.17) and in media, library and educational communication (8 NYCRR § 80.18).

*** Tenure parallels certification and may be earned for the elementary grades, N-6 (8 NYCRR § 30.5), the middle grades in non-academically departmentalized schools, 7-9 (8 NYCRR § 30.6) and for academic subjects in five areas, English, social studies, mathematics, science and foreign languages (8 NYCRR § 30.7). Some special subject tenure areas are available, e.g. art, education for the visually or hearing impaired (8 NYCRR § 30.8). A teacher earns tenure during his probationary term by alloting a substantial portion of his time, at least 40%, to insruction in the tenure area. 8 NYCRR §§ 30.1(g), (h), 30.9(e). The local districts must permit a teacher to spend the required amount of time in his tenure area [8 NYCRR § 30.9(a), (b)], but may also permit him to earn tenure in more than one area if he is appropriately certified. 8 NYCRR § 30.9(c), (d).

fully discharge the duties of their positions. Education Law §§ 3001-a, 3002. None may be subjected to inquiry about his religious beliefs. 8 NYCRR § 7.4.

New York has continuously recognized and protected the right to choose private education. *Judd* v. *Board of Education, supra,* 15 N.E. 2d at 582; *Id.* at 586 (CRANE, C. J., dissenting); *Packer Collegiate Institute* v. *University of the State of New York,* 273 App. Div. 203, 76 N.Y.S. 2d 499, 504 (3rd Dept.), *rev'd on other grounds,* 298 N.Y. 184, 81 N.E. 2d 80 (1948). But, "[p]rivate, denominational and sectarian schools," those wholly or partially under the control or direction of any religious denomination, are not part of the common school system. *Judd, supra,* at 579. *Id.* at 580-82. N.Y. Const. Art. 11, § 3. Compliance with the Compulsory Education Law, L. 1894, c. 671, eff. Jan. 1, 1895, currently Education Law Art. 65, Pt. I, requires that instruction outside the public school system be "substantially equivalent" and provided by "competent teachers." Education Law § 3204(2).* Elementary education must include the "twelve common branches" as in public schools [Education Law § 3204(3)(a)(1)], and secondary education must include English, civics, hygiene, physical training and American history, including principles of government, and may include communism. Education Law § 3204(3)(a)(2), (3). See discussion pp. 9-10. Courses in patriotism, citizenship, and historical documents need only be similar to those provided in public schools. Education Law § 801(1), (2). Flag exercises, the celebration of patriotic holidays, and special courses

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* Nonpublic schools are subject to state inspection. Education Law § 305(2). Pupils are included in certain statewide examinations. Education Law § 209; 8 NYCRR §§ 3.45, 8.2 103.2 The state subsidizes transportation, certain textbooks, the statewide examinations and record-keeping related to pupil census and health. It also provides approximately 1 million dollars annually for certain services offered by non-sectarian schools. Education Law § 3602-c.



in the federal and state bills of rights are not required. Education Law §§ 801(4), 802(1), (2). Neither the state nor the local districts qualify or certify teachers for private schools.*

Approximately 173,975 teachers now instruct 3,189,781 pupils in the state's public schools.** The cost of operating the schools exceeds 3 billion 100 million dollars annually. Approximately 40% is state funded, the balance is locally funded.*** Approximately 588,258 pupils attend private schools. Of that number, only 64,379 attend schools without religious affiliation.****

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* The state does not qualify teachers for public or private colleges or universities under Education Law § 3001(3) or under any other provision discussed in this brief. Dicta to the contrary in *Kay* v. *Board of Higher Education,* 173 Misc. 2d 943, 18 N.Y.S.2d 821 (Sup. Ct. N.Y. Co.), *aff'd,* 259 App. Div. 879, 20 N.Y.S. 2d 1016; *leave app. den.,* 259 App. Div. 1000, 21 N.Y.S.2d 396 (First Dep't), *leave app. den.,* 284 N.Y. 578 (1940) is erroneous.

** See 1976-77 PUBLIC SCHOOL PROFESSIONAL PERSONNEL REPORT Table 4, p. 16 (7/77) for teacher count. Pupil count for fiscal 1977-78 provided by the Education Department.

*** Figures for fiscal 1977-78 provided by the Education Department.

**** Pupil enrollment for fiscal 1977-78 provided by the Education Department. *Compare, Committee for Public Education* v. *Nyquist,* 413 U.S.. 756, 768 (1973), noting that 700,000-800,000 New York pupils attended private schools and that approximately 85% of those schools were religiously affiliated.

## Summary of Argument

Public schools determine the future of our society because they provide the knowledge, skills and attitudes that enable and encourage "good citizenship." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). The teacher gives this educational process meaning. He communicates the relevant information and makes discretionary decisions that reflect, support and enforce societal standards. Children learn from their teacher's example and imitate his attitudes. Education Law § 3001(3) qualifies individuals for this important public trust on the basis of their ability and willingness to identify with the American democratic principles they must impart to their pupils. Citizens and aliens who apply for citizenship are eligible for permanent teaching certificates. Aliens like appellees who can elect American citizenship but prefer to identify with a different national tradition are ineligible.

The public school teacher's essential role in training children to participate in American political processes requires that the distinctions drawn by § 3001(3) be reviewed and sustained under the reasonable relation test applicable to important governmental positions. *Foley* v. *Connelie*, —— U.S. ——, 98 S. Ct. 1067, 1070-71 (1978); *Sugarman* v. *Dougall*, 413 U.S. 634, 647-49 (1973). However, § 3001(3) also survives strict scrutiny because it is congruent with the protective political purposes it serves. The statute is limited to the educational system responsible for securing the future of the American political community and does not infringe the rights of parents to emphasize other political or philosophical values or religious beliefs in educating their children. It is co-extensive with the school years in which the purposes it serves can be best achieved, and it includes and excludes individuals in terms of its purposes. The included individuals adopt the principles they must teach and can now, or will shortly be able, to participate in the political processes that their teaching is intended to



support. The excluded individuals refuse to adopt the relevant principles and deny themselves the capacity to participate in American political processes, placing themselves at odds with the instructional purposes the statute reflects. Section § 3001(3) does not become imprecise because some applicant aliens are eligible for temporary certificates under related provisions. Only aliens disabled from electing American citizenship have obtained temporary certificates, and they do not provide the negative example manifested by the aliens excluded under § 3001(3). If § 3001(3) is not considered precise as a matter of law, the case must be remanded for an evidentary hearing. Appellants' proof on this issue (A. 33-A. 34) had to result in judgment in their favor if believed. However, the proof was rejected without hearing, and summary judgment granted for appellees (A. 45, A. 47-A. 48).

## POINT I

**Education Law § 3001(3) does not violate the equal protection clause because it limits permanent certification of public school teachers to citizens and aliens who apply for citizenship. Public education trains children to participate in American democratic society. Section 3001(3) qualifies the individuals who undertake this responsibility in terms of their ability and willingness to identify with this society. Although properly reviewed under the traditional equal protection test, Section 3001(3) survives strict scrutiny because the state interests involved are substantial and the classification is precise.**

### A. The traditional equal protection test requiring a showing of only a reasonable relationship to a legitimate state interest is applicable to Education Law § 3001(3).

"Americans regard the public schools as a most vital civic institution for the preservation of a democratic system

of government." *Abington School District* v. *Schempp,* 374 U.S. 203, 230 (1963) (BRENNAN, J., concurring). "The minds of our youth are developed there and the character of that development . . . determine[s] the future of our land. Indeed our very existence depends upon it." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 628 (1967) (CLARK, J., dissenting). Public education is training for the responsibilities of citizenship, *Wisconsin* v. *Yoder,* 406 U.S. 205, 221 (1972); *Abington School District* v. *Schempp, supra,* at 241-42, and perhaps the most dominant factor affecting political consciousness and participation in political processes. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 113 (1973) (MARSHALL, J., dissenting).

The public school teacher gives this educational process meaning. He instructs in the relevant subject matter from texts and by his own example. He instills positive attitudes towards democratic government and individual participation in the political process. He makes judgments on the basis of societal norms which modify his pupils' behavior and affect their academic and working lives. See discussion pp. 22-24. As this Court has recognized, the teacher "shapes the attitude of young minds towards the society in which they live." *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). Both the pupil and the state have a "vital concern" in his fitness to carry out this task. *Adler* v. *Board of Education, supra.* See *Donohue* v. *Copiague Union Free School District,* —— A. D. 2d ——, 180 (24) N.Y.L.J. 4 cols. 1, 3 (2d (2d Dep't July 31, 1978), denoting teacher's position as an "important public trust" but dismissing tort claim of illiterate graduate.

Education Law § 3001(3) and related provisions qualify individuals who undertake the responsibilities of public school teachers in terms of their ability and willingness to identify with the democratic principles they must impart. Permanent resident aliens applying for naturalization are eligible for permanent certificates under § 3001(3) because they are "most like citizens." *Mathews* v. *Diaz,* 426 U.S. 67,



83 (1976).* Only aliens like appellees who are able to choose American citizenship but prefer foreign citizenship are excluded from these certificates. Aliens permitted to work in the United States but disabled from electing citizenship by federal statutes are eligible only for temporary certificates. Education Law §§ 3001(3), 3001-a; 8 NYCRR § 80.2(i)(2).** Once their disabilities are relieved, they must apply for citizenship or cease teaching.***

The equal protection test requiring only a reasonable relation to a legitimate state interest applies to Education Law § 3001(3) even if it is viewed as a classification "based on alienage." *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971). *See Nyquist* v. *Mauclet,* 423 U.S. 1, 97 S. Ct. 2120, 2124-26 (1977), state classification providing grants, scholarships and loans to some alien students but not others is still one "based on alienage" and warrants strict scrutiny. *But see* dissenting opinions of BURGER, C.J., *Id.* at 2128, POWELL, J., *Id. at* 2128-29, and REHNQUIST, J., *Id.* at 2129-31, classification that does not exclude aliens *vel non* is not "based on alienage" and should be reviewed under reasonable relation test.

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* Permanent resident aliens are "immigrants" under 8 USC § 1101(a)(5). All other aliens are admitted to the United States on a temporary basis. *Elkins* v. *Moreno,* —— U.S. ——, 55 L.Ed.2d 614, 628 (1978).

** Conditional entrants [8 USC § 1153(a)(7)] and paroled refugees [8 USC § 1181(d)(5)] may work in the United States but cannot adjust their status to permanent residents without discretionary federal approval. See also 8 USC § 1101(a)(15)(A), (G)-(L), authorizing the admission of certain non-immigrants and limiting their worked-related activities but placing no similar restrictions on spouses and children.

*** Alien exchange teachers here as representatives of their own countries are eligible for temporary certificates without regard to disabilities. Education Law § 3005. A non-applicant alien is eligible for a temporary certificate in order to meet emergent instructional needs. 8 NYCRR § 80.2(i)(1). However, no such certificates have been issued. See discussion p. 7.

Last Term, the Court applied the reasonable relation test to New York's exclusion of aliens from the State Police, *Foley* v. *Connelie,* —— U.S. ——, 98 S. Ct. 1067, 1069-71 (1978), and reiterated the principles, stated initially in *Sugarman* v. *Dougall,* 413 U.S. 634, 467-49 (1973), that determine whether the classification here in issue is subject to strict scrutiny or to a test of reasonableness. Classifications excluding aliens from positions in democratic institutions that substantially affect the state's political community are subject only to a test of reasonableness. *Foley* v. *Connelie, supra,* at 1070-71, citing *Sugarman* v. *Dougall, supra.* Among the positions from which aliens may be excluded on this basis are those involving discretionary decisionmaking or the formulation of execution of broad public policy. *Foley, supra,* at 1071.

Education § 3001(3) classfiies aliens within this governmental exception to strict scrutiny. The continued existence of the "political community," *Sugarman* v. *Dougall, supra,* at 647, depends on public schools to train children to participate in democratic political processes, and the teachers' role in accomplishing this task is profound. See discussion pp. 16, 23-25. The teachers' decisions are no less discretionary than those of the policeman and the public policy he formulates and executes, no more precisely defined. His effect on the lives of his pupils is more significant and more enduring than the ballot of a voter, the choice of a legislator or the actions of a policeman or juror except in the most extraordinary circumstances. *See Foley* v. *Connelie, supra.*

Two additional considerations support the application of the reasonable relation test. First, § 3001(3) does not classify aliens in terms of the disabilities associated with their characterization as a "discrete and insular" minority. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53, n. 4 (1938). Permanent resident aliens determine their own eligibility for permanent teaching certificates under § 3001(3) by electing or refusing naturalization.



No period of enforced ineligibility is imposed during which the alien is incapable of changing his status to obtain the benefit of the statute.* Thus, the principal basis for subjecting legislation affecting aliens to strict scrutiny is not presented. *Nyquist* v. *Mauclet, supra* at 2129-31 (REHNQUIST, J. dissenting). *See Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313-14 (1976) (*per curiam*); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973). Moreover, since permanent resident aliens can elect to be treated like citizens for purposes of § 3001(3), there is no basis for invoking the extraordinary protection from the majoritarian political process that strict scrutiny implies. *Foley* v. *Connelie, supra,* at 1070. *See Massachusetts Board of Retirement* v. *Murgia, supra; San Antonio School District* v. *Rodriguez, supra.*

Second, the citizens and aliens eligible for permanent teaching certificates under § 3001(3) do not share any relevant characteristic with the aliens who are ineligible. Eligible aliens have chosen complete identification with the United States and will attain the same capacity as citizens to participate in the democratic political processes they teach their pupils. Ineligible aliens, "by clear implication," *Nyquist* v. *Mauclet, supra,* at 2128 (BURGER, C.J., dissenting), reject complete identification and cannot participate in political processes. *Foley* v. *Connelie, supra,* at 1070. Prior decisions subjecting alien-related classifications to strict scrutiny are limited to situations in which both included and excluded individuals were equally qualified for the positions in issue** or contributed equally to the

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* Education Law § 3001(a) and 8 NYCRR § 80.2(i)(2) complement § 3001(3) in this regard. In authorizing temporary certificates for aliens under federal disabilities, they avoid the period of ineligibility that would otherwise be imposed on aliens deprived of the capacity to make the election § 3001(3) requires.

** *See Examining Board* v. *Flores de Otero,* 426 U.S. 572 U.S. 572 (1976) (engineers); *In re Griffiths,* 413 U.S. 717 (1973) (lawyers); *Sugarman* v. *Dougall, supra* (aliens qualified for at least some civil service positions).

benefits sought with their tax dollars.* Herein, the non-applicant alien rejects the choice that would make him suitable and does not make any other contribution consistent with the purposes of the statute regardless of the length of his residence.

If Education Law § 3001(3) is strictly scrutinized, the inquiry is limited to whether or not the state has shown that its interest in the statute is "both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to . . . the safeguarding of its interest." *In re Griffiths, supra,* at 772 (footnotes omitted). *Foley* v. *Connelie, supra,* at 1073 (BLACKMAN, J., concurring); *Examining Board* v. *Flores de Otero, supra,* at 602; *Sugarman* v. *Dougall, supra,* at 642. The state interests advanced by the statute need not be compelling. *Compare* opinion of the district court, A. 42-A. 43.

**B. New York's interest in educating public school children for participation in American democratic society is legitimate and substantial. In denying permanent teaching certificates to aliens who are eligible for American citizenship but prefer foreign citizenship, Education Law § 3001(3) establishes a narrow limitation consistent with the achievement of this interest. There is no appropriate classification which is more precise and less restrictive.**

Public education is "perhaps the most important function of state and local government," *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) because it is the institution through which democratic society secures its future. See discussion p. 15. Public schools provide "the very foundation of good citizenship," and awaken children to the societal values which support our democratic system. *Brown* v. *Board of Education, supra.* This initiation into

* *See Nyquist* v. *Mauclet, supra* (student grants, scholarships and loans); *Graham* v. *Richardson, supra* (welfare).



our "common" heritage is "civic and patriotic," free from "parochial, divisive, or separatist influences." *Abington School District* v. *Schempp,* 374 U.S. 203, 242 (1963) (BRENNAN, J., concurring). It is an accepted, and perhaps the most powerful agent, for social cohesion. *McCollum* v. *Board of Education,* 333 U.S. 203, 216 (1948) (FRANKFURTER, J., concurring); *Minersville District* v. *Gobitis,* 310 U.S. 586, 595-96 (1940).

Public schools provide children with the knowledge and skills necessary for participation in national, state and local political processes. *Wisconsin* v. *Yoder,* 406 U.S. 205, 221 (1972); *Brown* v. *Board of Education, supra,* at 493; CUBBERLY, EDUCATION IN THE UNITED STATES 113 (1919); National Council on Education, WHAT ARE THE MAJOR OBJECTIVES OF EDUCATION ("Objectives of Education") 6-12 (1931); Commission on the Reorganization of Secondary Education, CARDINAL PRINCIPLES OF SECONDARY EDUCATION ("Principles of Secondary Education") 7-14 (1918). New York's curriculum requires courses in civics, national and state history, constitutional rights and obligations and the celebration of patriotic events and rituals.* *See* discussion pp. 9-10 and Educational Policies Commission, THE CENTRAL PURPOSE OF AMERICAN EDUCATION (1961) ("Central Purpose of Education"); Citizen Education Study, Detroit, DEVELOPMENT OF CHILDREN (1949); Objectives of Education; Principles of Secondary Education; HESS & TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN ("Political Attitudes in Children") 105-108 (1967); DAWSON & PREWITT, POLITICAL SOCIALIZATION ("Political Socialization") 155 (1969). *See also West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Minersville School District* v. *Gobitis, supra,* at 596 (1940); *Russo* v.

* It has been shown that public school civics courses do increase support for democratic principles. Litt, *Civic Education, Community Norms and Political Indoctrination,* 28 AM. SOC. REV. 69, 73 (1963).

*Central School District No. 1,* 469 F. 2d 623, 632 (2d Cir. 1972).

Public schools also instill the values and attitudes necessary to full and effective participation in political processes. MERELMAN, POLITICAL SOCIALIZATION AND EDUCATIONAL CLIMATES ("Political Socialization and Educational Climates") 5 (1971); Political Socialization, p. 147; KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 316 (1961); MERRIAM, THE MAKING OF CITIZENS 17-19 (1931); DEWEY, DEMOCRACY AND EDUCATION 26 (1926); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U. PA. L. REV. 1293, 1297, 1343 (1976).

The role of the public schools in forming and preserving the character of the political community is demonstrated by recent studies. *See* Note, *Aliens' Right to Teach: Political Socialization and the Public Schools* ("Aliens' Right to Teach"), 85 YALE L.J. 90, 100-105 (1975). By their last year of secondary education, public school children from socially and economically diverse backgrounds, who varied in their initial acceptance of democratic principles, develop shared, positive attitudes about freedom of speech and participation in government. Political Socialization and Educational Climates, pp. 9-11. Between the second and eighth grades, public school children gradually approach the societal norm in their understanding of democracy and of the roles of government officials. Political Attitudes in Children, pp. 31-66, 111-115. Once the student leaves secondary school, his orientation towards our democratic system is largely crystallized. WILSON, COLLEGE PROFESSORS AND THEIR IMPACT ON STUDENTS 88-89 (1975). His values are formed during his elementary and secondary school years, and he now shares and defines societal standards. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U.PA.L.REV. 1293,



1343-1344 (1976). *See also Tilton* v. *Richardson,* 403 U.S. 672, 686 (1971); Gianella, *Religious Liberty, Non-Establishment and Doctrinal Development, Pt. II: The Non-Establishment Principle* 81 HARV.L.REV. 513, 581-584 (1968).

The teacher's role in the public schools is vital. Throughout the period of school attendance he is the educational official with whom the pupil has constant and direct contact. He is the first representative of societal authority outside the family circle the pupil regularly encounters. Political Socialization, pp. 158, 163; Aliens' Right to Teach, p. 102. *See Abington School District* v. *Schempp, supra,* at 263 (BRENNAN, J., concurring); Political Attitudes in Children, p. 20. He is viewed with "awe and respect," especially in the primary grades, The John Dewey Society, THE TEACHER'S ROLE IN AMERICAN SOCIETY ("Teacher's Role in American Society") 75 (Stiles, ed. 1957), and the majority of students identify him as a government official. EASTON & DENNIS, CHILDREN IN THE POLITICAL SYSTEM ("Children in the Political System") 122 (1969). *See* COE, EDUCATING FOR CITIZENSHIP ("Educating for Citizenship") 38 (1932). By the eighth grade, the pupil believes that his teacher is more helpful than other governmental figures or institutions. Children in the Political System, pp. 150-151 (results of a survey of second through eighth grade pupils).

The teacher makes discretionary decisions that significantly affect the most "sensitive" areas of the pupil's life. *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1960). He assesses each pupil's abilities in determining whether to place him in a "general," "vocational" or "college preparatory" curriculum track. *Goss* v. *Lopez,* 419 U.S. 565, 597 (1976) (POWELL, J., dissenting). He assesses the pupil's achievement and behavior on the basis of societal standards in deciding whether to promote him. *Goss, supra;* Teacher's

Role in American Society, p. 74. He initiates disciplinary action such as suspension and expulsion, *Goss, supra,* at 597 (POWELL, J., dissenting) and may impose corporal punishment to modify a pupil's behavior. *Ingraham* v. *Wright,* 430 U.S. 651 (1977).

The teacher's daily classroom activities require him to instruct his pupils in American democratic principles and instill the values and attitudes which give those principles meaning. See discussion pp. 9-10, 16, 22-24. Within existing curriculum requirements, the teacher is free to decide what information and skills are important. Teachers' Role in American Society, p. 75; DEWEY, EDUCATION TODAY 8-9 (1940); Educating for Citizenship, p. 102. If a standard text is mandated, he still has largely non-reviewable discretion to emphasize what he wants and to choose the teaching methods he will use. *Lemon* v. *Kurtzman,* 403 U.S. 602, 617 (1970); Political Socialization and Educational Climates, p. 104; Central Purpose of Education, p. 11.

In addition to instructing his pupils with consciously selected materials and teaching methods, the teacher instructs by his own example. *Miller* v. *School District,* 495 F. 2d 658, 667 (7th Cir. 1974); *Bay* v. *State Board of Education,* 253 Ore. 601, 604, 378 P. 2d 558, 561 (1963); Political Socialization, p. 163; Teacher's Role in American Society, p. 81; Aliens' Right to Teach, p. 102. Children identify with their teachers and attempt to imitate the attitudes they perceive, including political attitudes. Political Attitudes in Children, p. 21. By the end of the primary grades, students substantially share their teachers' attitudes towards democracy. Children in the Political System, pp. 111-40.

A very high correlation exists between the attitudes held by eighth grade pupils and by their teachers on the qualities of "good citizens," the concepts comprising the democratic ideal, the relative importance of decisions made by governmental figures and institutions, the coercive power of the



police and the President, the responsiveness of governmental figures and institutions to individual and community problems, and the relative influence of the United States and the United Nations in preventing war. Political Attitudes in Children, pp. 31, 39, 41, 49, 55, 66, 111-16. Given that both conscious and subconscious attitudes affect the quality of a teacher's instruction, he may be required to be the "ego ideal" of the American democratic principles, values and attitudes he must impart. Teacher's Role in American Society, p. 96; Educating for Citizenship, pp. 102-103.

Education Law § 3001(3) bears directly on the state interests just described. The teachers who obtain permanent certificates under the statute determine the character of the public education New York provides by reason of their numbers, now approximately 173,975, and lengthy period of service. The citizens and aliens eligible for permanent certificates identify with the democratic principles, values and attitudes they will teach from curriculum materials and by their own example. The ineligible alien, although able to choose American citizenship, prefers foreign citizenship. He does not want to be a member of the political community. See *Foley* v. *Connelie,* —— U.S. ——, 98 S. Ct. 1067, 1070 (1978). He does not want to participate in democratic decisionmaking, *Ibid.,* and his choices in this regard are inconsistent with public education's purpose to secure the future of the American society and to engender affirmative support for its institutions. As is apparent, these inclusionary and exclusionary characteristics of § 3001(3) safeguard and are congruent with the substantial state interests the statute is intended to serve. No 'individualized' determination of eligibility is warranted. *Compare* opinion of the district court, A. 45, A. 47-A. 48. The excluded alien adopts exactly the attributes the statute rejects when he elects non-applicant status, and no investigation of his background or credentials can overcome the effect of his choice.

Education Law § 3001(3) is hardly objectionable because it applies to "*all* teaching positions in the public school system." Opinion of the district court, A. 45. All teachers instill political values and attitudes by their own example regardless of the subject matter they teach, and all teachers make important, discretionary judgments based on societal norms. See discussion pp. 16, 23-25. Moreover, the district court's view that certain grades, teaching positions or subject matters could be made available to non-applicant aliens with permanent teaching certificates (A. 45, A. 48) ignores the existing organization of public school studies.

Elementary school studies must include the common branches—arithmetic, reading, spelling, writing, English, geography, United States history, civics, hygiene, physical training, New York history and science. Education Law § 3204(3)(a)(1); 8 NYCRR § 100.1(e). Teachers certified for early childhood and upper elementary education (N-6), the certification requested by appellees, instruct in all of these subjects. 8 N.Y.C.R.R. §§ 80.1(a)(7), 80.15 (a)(1)(i), (b). English, civics, hygiene, physical training, American history, including the principles of democratic government are required in secondary schools. Education Law § 320(3)(a)(2); 8 NYCRR § 100.1(a)-(d). Teachers certified for secondary education may teach all common branches plus an academic subject—English, Foreign Language, Science, Mathematics or Social Studies —under N 9 certificates [8 NYCRR §§ 80.1(a)(11), 80.15 (a)(1)(ii), (b)], or may confine themselves to the academic subjects. 8 NYCRR §§ 80.1(a)(1), 80.16(a)(1)(ii), (b). Since all teachers can be required to instruct outside their certification one day per school week, 8 NYCRR § 80.2(c), and may, if they wish, instruct under more than one certificate, 8 NYCRR § 30.9(c), (d), the Foreign Language teacher may be the Social Studies teacher, periodically or constantly. See discussion p. 11. All teachers are obliged to give the required course components in patriotism, citizenship and American historical



documents to the extent applicable in their grades and to honor the flag and patriotic events. Education Law § 801(1), (2), (3), (4); § 802(1), (2), § 3204(3)(a)(2); 8 NYCRR Part 108, § 109.1. See discussion pp. 9-10.

The district court did not suggest the basis on which the subject matter and teaching responsibilities just described could be reallocated to accommodate non-applicant aliens with permanent certificates, and no practical basis for such reallocation readily appears. However, it is evident that the pupils and boards of education would be denied the complete instructional services they now receive from their teachers under any such plan. Further, the distinctions between citizens and aliens or between aliens and aliens so drawn cannot reasonably be expected to be more precise than the distinctions now drawn by § 3001(3).

The authorization of temporary certificates for certain non-applicant aliens under Education Law §§ 3001-a, 3005 and 8 NYCRR § 80.2(i) is not inconsistent with § 3001(3). Aliens eligible for temporary certificates under 8 NYCRR § 80.2(i)(2) have little impact on the public educational process because their numbers are few (approximately 200 obtain certificates annually) and their certificates are in effect only briefly.* More significantly, § 80.2(i)(2) does not select the "negative example" that § 3001(3) avoids. The alien eligible under § 80.2(i)(2) cannot choose between American and foreign citizenship because of his disability, whereas the alien ineligible under § 3001(3) has chosen inconsistently with the responsibilities of public school teaching by electing foreign citizenship. See discussion p. 25.**

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* Certificates issued under § 80.2(i) are generally valid for five years. E.g. NYCRR §§ 80.15(a)(2), 80.16(a)(2).

** The same analysis applies to Education Law § 3001-a, authorizing temporary certificates for aliens under quota disabilities. Section 80.2(i)(2) is a broader classification encompassing all disabilities. See p. 7, n.1.

Section 80.2(i)(1), authorizing temporary certificates for non-applicant aliens with skills not available from permanently certified teachers, has had no actual effect on the operation of Education Law § 3001(3) because no certificates have been issued. See discussion p. 7, n. 1. The regulation contemplates a situation in which pupils will be denied instruction if a certificate is not issued. The state interests served by § 3001(3) are not opposed by § 80.2 (i)(1) under such emergent circumstances, they simply yield to the then more immediate interest in adequate education for the affected pupils. Section 80.2(i)(1) does not imply that the instruction it authorizes is the same as that provided by teachers qualified under § 3001(3) or § 80.2(i)(2). *Compare* opinion of the district court, A. 45-A. 46. It merely avoids the alternative of no instruction at all.*

Section 80.2(i)(1) is not akin to the waivers noted in *Sugarman* v. *Dougall*, 413 U.S. 634, 643 (1973). Waivers under former New York Civil Service Law § 53(2) admitted non-applicant aliens to a "class" or "classes" of positions during shortages of qualified personnel and permitted them to remain indefinitely.** Its use could have resulted in the employment of large numbers of aliens in face of the statute's purported interest in barring such employment. Section 80.2(i)(1) considers a candidate and a particular instructional need for five years. Its impact on public education will be *de minimis* even if certificates are issued.

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* Section 80.32 of Title 8 NYCRR avoids the same alternative by authorizing the employment of teachers who do not meet educational standards for certification when certified teachers are not available. See p. 7, n.2.

** The term "class," if applied to teachers, would probably encompass all teachers certified in early childhood and upper elementary education (N-6), all teachers certified in English, etc. "Classes" would probably refer to teachers as a profession.



The remaining basis for certifying non-applicant aliens is Education Law § 3005, authorizing temporary certificates for alien exchange teachers. The statute is the reciprocal of § 3001(3) and demonstrates the latter's validity. The alien exchange teacher is invited here to instruct American pupils about the national tradition he represents. To require him to give up his citizenship in order to teach this material would be absurd in view of his purpose here. Equally, if the instructional purpose is the communication of American democratic principles, values and attitudes, the teacher who undertakes the task should share those principles, values and attitudes as § 3001(3) requires.*

The fact that Education Law § 3001(3) does not exclude aliens from teaching in private schools is not a "glaring" example of "imprecision" (opinion of the district court, A. 45) but a recognition of the different objectives of public and private education and of the rights of pupils and their parents to have those objectives met. See discussion pp. 12-13. Private schools instill "values of their own" separate from the "uniquely democratic values" taught in public schools. *Abington School District* v. *Schempp*, 374 U.S. 203, 242 (1963) (BRENNAN, J., concurring). *See* Political Socialization, p. 160; Educating for Citizenship, p. 130. These "values" are predominantly religious.** Curriculum is developed and teachers are qualified to foster the pupils' adherence to the particular religion with which his school identifies. *Lemon* v. *Kurtzman*, 403 U.S. 634-36 (DOUGLAS, J., concurring), noting that "it is well known that every-

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* Education Law § 3005 also illustrates the district court's error in viewing § 3001(3) as limiting the free exchange of ideas in the classroom (A. 48).

** Private education in the United States was sectarian in origin and is overwhelmingly secretarian today. *Abington School District* v. *Schempp, supra,* at 238-40, n. 7. In New York, almost ninety per cent of the private school pupils attend secretarian schools. See p. 13.

thing taught in most parochial schools is taught with the ultimate goal of religious education in mind." *See Wolman* v. *Walter*, 433 U.S. 229, 243-44 (1977); LANG, PREPARATION FOR CITIZENSHIP IN CURRENT COURSES OF STUDY IN CATHOLIC HIGH SCHOOLS 1 (1950). *See also* BOETTNER, ROMAN CATHOLICISM 360 (1962); FICHTER, PAROCHIAL SCHOOLS: A SOCIOLIGICAL STUDY 86 (1958). Curriculum and teacher qualifications in non-sectarian private schools reflect the values and philosophies of their founding educators, or their governing societies, even the national preferences of the parents whose children attend. *See* Political Socialization, p. 160; Educating for Citizenship, p. 130.

Parents select the values their children are taught when they choose public, private sectarian or private non-sectarian education for their children. New York recognizes the constitutional protection that extends to this parental choice* and requires that both sectarian and non-sectarian private schools be left free to determine the character of the education they provide subject only to minimum standards requiring competent instruction in essential subject matter. Education Law § 3204(2). *Judd* v. *Board of Education*, 278 NY 200, 15 N.E. 2d 576, 582, 586 (1938); *Packer Collegiate Institute* v. *University of the State of New York*, 273 App. Div. 203, 76 N.Y.S. 2d 499, 504 (3rd Dept.), *rev'd on other grounds*, 298 N.Y. 184, 81 N.E. 2d 80 (1948) and discussion pp. 12-13.

Minimum standards insure an adequate secular education for all pupils. *Wolman* v. *Walter*, *supra*, at 240; *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 479-80 (1973); *Board of Education* v. *Allen*, 392 U.S. 236 (1968). They do not require that the content of private and pub-

* *See Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Lemon* v. *Kurtzman*, *supra*, at 663 (WHITE, J., dissenting); *Abington School District* v. *Schempp*, *supra*, at 242 (BRENNAN, J., concurring); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).



lic education be the same.* They do not require that public and private school teachers possess the same qualifications. Indeed, to establish such requirements would interfere with the separate, constitutionally protected objectives the respective processes serve.

Education Law § 3001(3) and related provisions are limited to the teacher's role in the public school system described herein. Neither their terms nor their legislative histories refer to the regulation of any other profession. See discussion pp. 6-8. The district court nonetheless viewed the provisions as a part of a "comprehensive statutory schema . . . [regulating] a broad range of employment." A. 53, n. 14. The alleged "schema" consists of statutes enacted over a period of eighty years referring to widely divergent professions and trades.** Several have been modified to repeal citizenship requirements.*** Several

* Compulsory Education Law standards for all schools are general, i.e. reading, American history, etc. Education Law § 3204 (3)(a)(1), (2). More specific state requirements, Education Law §§ 801 *et seq.*, distinguish between public and private schools by their terms. For example, courses in citizenship and historical documents offered in private schools need only be similar to those offered in public schools. Education Law § 801(1), (2). Flag exercises, the celebration of patriotic holidays and special courses in federal and state bills of rights are not required at all. Education Law §§ 801(4), 802(1), (2). See pp. 12-13.

** The earliest provision cited by the district court imposed a citizenship requirement for the certification of public accountants in 1896. L. 1896 c. 312 eff. April 17, 1896; repealed L. 1971 c. 987 eff. Sept. 1, 1971, enacting Education Law § 7404(6) (McKinney 1972). The latest provision cited is a citizenship requirement for certification of animal health technicians enacted in 1976. L. 1976 c. 539 § 7 eff. July 1, 1977, adding Education Law § 6711(6) (McKinney's Supp. 1977-78).

*** The citizenship requirement for licensing of certified public accountants, enacted in 1896, was repealed in 1971. L. 1896 c. 312 eff. April 17, 1896; repealed L. 1971 c. 987 eff. Sept. 1, 1971, enacting Education Law § 7404(6) (McKinney 1972). The citizenship requirements for licensing of nurses, L. 1938 c. 472 eff. July

*(footnote continued on following page)*

contain no citizenship requirements at all or include both citizens and declarants.* As is apparent, these provisions lack comprehensiveness, internal consistency, unity of subject matter and of time of enactment and cannot be fairly characterized as a statutory plan. *See Erlenbaugh* v. *United States,* 409 U.S. 239, 244-46 (1972).

If Education Law § 3001(3) is not now accepted as precisely enforcing New York's interest in training public school children to participate in American democratic society, this case must be remanded for an evidentiary hearing. Appellants offered to prove that the qualifications elicited by § 3001(3) necessarily related to this state interest and that the distinctions drawn were coextensive with the interest and internally consistent (A. 33-A. 34). The district court rejected the offer of proof and awarded summary judgment for appellees. To reach this result, the court had to find adversely to appellants on the necessary relation issue. *See Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 544 (1970), precluding summary judgment under Title VII's "demonstrable relation" standard. It did so without hearing proof which, if believed, compelled judgment in favor of appellants. *See Adickes* v. *Kress & Co.,* 398 U.S. 144, 157 (1970); *Sartor* v. *Arkansas Gas Corp.,* 321 U.S. 620, 627 (1944). The court's error in this

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*(footnote continued from preceding page)*

1, 1938, were repealed by L. 1971 c. 987, eff. Sept. 1, 1971, enacting Education Law § 6904(6) (McKinney 1972). The requirements for psychologists, L. 1956 c. 737 eff. April 17, 1956, were repealed by L. 1971 c. 987 § 2 eff. Sept. 1, 1971, enacting Education Law § 7603(6) (McKinney 1972).

* Citizenship is not required for certification in professional and practical nursing (Education Law §§ 6904, 6905), podiatry (§ 7004), optometry (§ 7104), ophthalmic dispensing (§ 7124) architecture (§ 7304), certified public accountancy (§ 7404), psychology (§ 7603), and social work (§ 7704). The Education Law licenses both citizens and declarants in the following professions: physician (§ 6524), physical therapist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), shorthand reporter (§ 7504) and masseur (§ 7804).



regard is revealed by its statements allegedly supporting summary judgment. The court first acknowledges that appellants offered to show that "the non-applicant alien's voluntary decision to retain his native citizenship . . . renders him a negative influence" "in a curriculum that requires imparting principles of American citizenship," A. 47-A. 48, and concludes that no part of the proposed testimony supported the contention that such aliens were "unqualified to teach" in the public schools (A. 48).

## CONCLUSION

**The Order and Judgment below should be reversed, and Education Law § 3001(3) declared constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, the Order and Judgment should be vacated, and the case remanded for hearing on the necessary relation between the classification established by the statute and New York's interest in educating public school children for participation in American democracy.**

Dated: New York, New York
August 7, 1978

Respectfully submitted,

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# APPENDIX

Education Law § 3001-a states:

"TEMPORARY TEACHING PERMIT, PERSON NOT A CITIZEN.

A person, not a citizen, who files with the department satisfactory proof that he has filed with the attorney general of the United States a first preference petition pursuant to section two hundred three (a) (1) of the immigration and nationality act [8 U.S.C. 1153 (a)(1)] and that said petition has been approved by such attorney general upon certification by the department of justice, immigration and naturalization service, that he is unable to adjust his status to that of a lawful permanent resident of the United States solely because of an over-subscribed quota to which he is chargeable may receive from the commissioner of education, notwithstanding the provisions of subdivision three of section three thousand one of this chapter, a temporary permit validating his employment in a teaching capacity in the public schools of the state. Such temporary permit shall be valid for one year from the date of issue and may, upon proper application to the commissioner, be once renewed for a further period of one year. Such application shall be in the form required by the commissioner. Such applicant shall not be employed until he shall have taken and subscribed the following oath or affirmation:

'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability ,the duties of the position of ..... (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.' The affidavit and oath required by this section shall be administered by the superintendent of schools having jurisdiction over the

school district in which such person is to be employed or his duly authorized representative and shall be filed with the commissioner of education. Copies thereof shall be filed with the superintendent of schools."

Education Law § 3005 states in part:

"LEAVE OF ABSENCE TO TEACHERS FOR TEACHING IN FOREIGN COUNTRIES

"The trustee, trustees or board of education of any school district may permit any teacher having had at least five years service in the school or schools of said district to apply for and receive a leave of absence for a period not to exceed two years for teaching in the schools of a foreign country provided such foreign country shall have agreed to furnish a teacher of corresponding rank or school level to fulfill the duties of the said teacher on leave of absence.

* * *

Notwithstanding any of the provisions of this chapter, when the qualifications of the teacher from the foreign country have been approved by the commissioner of education, he shall be legally entitled to render instructional service in any public school in this state and a permit for a period not to exceed two years for such service shall be issued by the commissioner of education without the payment of fee. * * *"

8 NYCRR § 80.2(i) states:

*"Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons."